Supreme Court, U.S.
FILED

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IN THE

UNITED STATES SUPREME COURT

DOCKET NO. _____

MICHAEL SPENCE,

Plaintiff-Petitioner,

v.

NORFOLK SOUTHERN RAILWAY COMPANY AND NORFOLK SOUTHERN CORPORATION,

Defendants-Respondents.

Appeal from the Georgia Supreme Court

PETITION FOR WRIT OF CERTIORARI

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April 30, 1994

49 pp

ISSUE PRESENTED

Whether a railroad employee suffering a total and disabling mental breakdown with attendant physical symptoms as a result of his employer's negligence must prove under the Federal Employers' Liability Act that his breakdown occurred as a result of "unconscionable abuse" by his employers in order to recover damages under the Act for the negligent infliction of emotional distress.

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STATEMENT OF JURISDICTION

Plaintiff-Petitioner, Michael Spence, filed a complaint against his Railroad employer, Defendants-Respondents, Norfolk Southern Railway Company and Norfolk Southern Corporation, on January 17, 1992, seeking compensation for the negligent infliction of emotional distress, attendant physical symptoms and for lost future wages. Mr. Spence suffered a totally disabling mental breakdown due to unreasonable stress or pressure to which he was subjected in his work. Mr. Spence's claim was predicated upon the Federal Employers' Liability Act, 45 U.S.C.A. §51 et seq.

Defendants moved for summary judgment which was denied by the trial court. Defendants then received permission from the trial court to file an immediate appeal.

On August 19, 1993, the Georgia Court of Appeals ruled that the state court erred in denying the

motion for summary judgment submitted by Defendants Norfolk Southern Corporation and Norfolk Southern Railway Company and reversed the denial of Defendants' motion for summary judgment. A motion for reconsideration filed by Plaintiff Spence was denied by the Georgia Court of Appeals. Plaintiff Spence then filed a petition for writ of certiorari in the Georgia Supreme Court which was denied on January 6, 1994. Again, a motion for reconsideration was filed. The Georgia Supreme Court denied the motion for reconsideration on February 3, 1994.

Plaintiff Spence now petitions this Court for a writ of certiorari to appeal from the Georgia Supreme Court's denial of his motion for reconsideration. This petition is being filed within 90 days of the Georgia Supreme Court's refusal to grant relief to Plaintiff-Petitioner Spence.

This Honorable Court has jurisdiction over this matter because a Federal question has been raised as to the appropriate standard or criteria which must be met by

one seeking compensation for an emotional or mental injury under a Federal law, the Federal Employers' Liability Act.

STATUTES INVOLVED IN THE CASE

45 U.S.C.A. §51 of the Federal Employers' Liability Act:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 U.S.C.A. §63 of The Hours of Service Act:

No operator, train dispatcher, or other employee who by the use of the telegraph, telephone, radio, or any other electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements -

(1) shall be required or permitted to be or remain on duty for more than nine hours, whether consecutive or in the aggregate, in any twenty-four-hour period in any tower, office, station, or place where two or more shifts are employed;

(b) For purposes of subsection (a), in determining the number of hours an employee is on duty in a class of service, and at a place, described in paragraph (1)... of such subsection, there shall be counted, in addition to the time spent by him on duty in such service at such place, all time on duty in other service performed for the common carrier during the twenty-four-hour period involved. (Emphasis supplied).

Restatement of Torts, Second, §46:

a. This Section is concerned only with emotional distress which is inflicted intentionally or recklessly. As to the negligent infliction of emotional distress, see §§312, 313, 436, and 436A.

d. Extreme and outrageous conduct. The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which

would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

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STATEMENT OF THE CASE

Petitioner Michael Spence (hereinafter "Mr. Spence") filed suit against his Railroad employers, Respondents Norfolk Southern Railway Company and Norfolk Southern Corporation (hereinafter "the Railroads") seeking compensation under the Federal Employers' Liability Act, 45 U.S.C.A. §51 et seq, for a totally disabling mental breakdown that Mr. Spence alleges was caused by the negligence of the Railroads. In partial support of his negligence claim, Mr. Spence alleged that he was required to work two extremely stressful jobs for long periods of time in violation of the Hours of Service Act, 45 U.S.C.A. §61 et seq, specifically 45 U.S.C.A. §63. Despite complaints by Mr. Spence and other of his co-employees that the job stress was unbearable, the Railroads refused to lessen the pressures of his working environment. Mr. Spence belonged to no union and could not then file any kind of grievance

procedure or apply for relief under the Railway Labor Act, 45 U.S.C.A. §151 et seq as almost all other Railroad employees are entitled to do. Eventually, Mr. Spence suffered a complete and total mental breakdown which has left him disabled to this day from performing any type of gainful employment.

The undisputed facts, briefly summarized, are these: Mr. Spence began working as a communications coordinator for the Railroads in 1974 and worked without incident until 1987 when half of the communications coordinators employed in the Railroad's Atlanta offices took early retirement being offered by the Railroads so that the Railroads could phase out some of its employees. Two communications coordinators, one of whom was Mr. Spence, were left to perform the work originally done by four. Mr. Spence was required to work at least 12 hours a day, sometimes 16 hours, for 70 straight days without any time off. The stress was enormous and Mr. Spence began to

complain to his supervisors that the work load was excessive.

The communications coordinator's job was one that had to be filled 24 hours per day, 7 days per week by workers working in shifts. During the same time that the Railroads were requiring Mr. Spence to double his hours as a communications coordinator he was also being asked to perform, simultaneously with his communications coordinator job, a new, second task as a tape detector analyst. The job descriptions for communications coordinator and tape detector analyst as written by the Railroads demonstrate that each job carries immense responsibilities. The position description for a detector analyst alone declares that he or she must be "able to operate under extreme duress".

While the Railroads were cutting the positions of its communications coordinators, they were also reducing the number of detector analysts employed in the Atlanta

offices. The detector analysts were to be replaced by computers who would perform their duties. However, jobs were being eliminated and the work performed by fewer and fewer employees long before the computers were actually in place. Mr. Spence continued to pull double duty as a communications coordinator and tape detector analyst through January, 1989, when he finally could withstand the stress no longer and suffered a total nervous breakdown.

Tape detector analysts were required to work in shifts of only 8 hours per day in an office which was open around the clock. Those working as tape detector analysts, like Mr. Spence, worked without any kind of rest break whatsoever. There was no time off for lunch and the employees constantly walked and read tapes without any kind of rest.

Tape detector analysts are to the movement of trains in a sense what air traffic controllers are to the movement of planes: they must see that trains arrive safely

at their destination by monitoring conditions which could cause derailment.

Tape detector analysts are responsible for reading "ticker tapes" which are produced by hot box detectors, metal boxes or "huts", stationed approximately 25 to 26 miles apart on all track owned by the Railroads. These hotbox detectors receive information from electric lead-outs connected to train rails and transmit this same information to the Atlanta Hotbox Detector Center to be read by the tape detector analyst. A tape is printed as a continuous line along a graph showing "spikes and valleys" similar to the printout produced by a polygraph machine or similar type machine. The tape detector analysts would interpret the tape to see if there was any dangerous defect in the wheel bearings or wheel flanges on trains passing by the hotbox detectors. The tapes would also reveal whether any equipment on a train car was dragging on a track. These conditions could possibly cause derailment of a train and

catastrophic injury to Railroad employees or the public at large or, in the very least, tremendous property damage.

There were approximately 255 hotbox detectors located on track owned by the Railroads producing tapes from every single wheel on every single Railroad car on every single train passing the hotbox detector. Trains commonly exceeded a mile in length and contained 130 to 150 cars. The Atlanta Hotbox Detector Center had 55 tape machines which produced tapes constantly. There would be 8 to 10 tapes being printed at a minimum at any given time with only two detector analysts on duty to read the tapes. They would have approximately 30 seconds in which to read and interpret any given tape with an average of 2,500 tapes to read every day.

If a detector analyst felt from reading a tape that a train needed to be stopped to prevent a derailment, they would call the train to have it stopped and inspected for defects. Failure to properly read a tape which resulted in a

derailment could lead to the firing of a detector analyst; conversely, analysts were criticized if a train was stopped out of caution and an inspection revealed no defects.

During the time that the Railroad was phasing out the jobs of communications coordinators and tape detector analysts, it was not reducing the number of trains running on its tracks. An ever-decreasing number of employees were being required to read an increasing number of tapes without any period of rest, always standing on their feet, 8 hours a day. Mr. Spence was being required to work simultaneously as both a tape detector analyst and a communications coordinator.

As a communications coordinator, while reading tapes as a tape detector analyst, Mr. Spence received phone calls regarding defects or malfunctionings, repairs, and installation of electric signal and warning devices at road crossings over the Railroads' line of track. It was his job to make sure that signal devices were installed properly or

repaired as promptly as possible and he dispatched crews to areas where they were needed. He spent all day at work reading tapes while receiving and making calls over a phone that he balanced on his shoulder. Almost every day he worked he was required to work hours in violation of the 9 hours maximum work per day established by the Hours of Service Act, specifically 45 U.S.C.A. §63.

Mr. Spence and other employees complained about the undue stress that the Railroad was imposing on its employees.

Mr. Spence began to experience insomnia and suffered a dramatic weight loss between December, 1988, and January, 1989. His attentiveness to tasks diminished and he began to suffer from periods of acute sobbing. He felt fearful, anxious, and unable to report to work. He sought medical help after a January 19, 1989, breakdown and has been declared by a doctor to be "permanently and totally disabled due to psychoneurosis."

On these facts, Mr. Spence sought compensation from the Railroads for the negligent infliction of emotional distress, Mr. Spence contending that his injury was both foreseeable and preventable. The Railroads filed a motion for summary judgment in the trial court arguing that Mr. Spence had suffered a purely emotional injury which was not generally compensable under the Federal Employers' Liability Act, among other arguments. The motion for summary judgment was denied but the trial court granted the Railroad's permission to apply to the Georgia Court of Appeals for an interlocutory appeal which the Georgia Court of Appeals also granted.

The Georgia Court of Appeals declined to decide whether a Plaintiff may assert a claim under the Federal Employers' Liability Act for the negligent or intentional infliction of emotional distress, but held as a matter of law that the conduct at issue in Mr. Spence's claim did not support liability for negligent or intentional infliction

of emotional distress inasmuch as the conduct by the Railroads was not "extreme and outrageous". The Georgia Court of Appeals declared further that Mr. Spence could not have made out an actionable case even if the Railroads had acted with a tortious or criminal intent or where the Railroads intended to inflict emotional distress. "Liability," according to the Georgia Court of Appeals, "has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." (Georgia Court of Appeals Opinion, p. 5) (Copy of the Opinion attached).

In essence, the Georgia Court of Appeals has declared that there can be no action brought under the Federal Employers' Liability Act for the negligent infliction of emotional distress. Railroad employees cannot seek compensation under the Federal Employers' Liability Act in

Georgia even where there railroad employers act criminally or tortiously with an intent to inflict emotional distress unless the Georgia Appellate Courts determine the railroad employer's conduct to be outrageous, extreme, beyond all possible bounds of decency, atrocious, and utterly intolerable in a civilized community -- a criteria not yet found in any Georgia case.

The standard set by the Georgia Appellate Courts for one bringing a claim under the Federal Employers' Liability Act for the negligent infliction of emotional distress is a standard that is not required by any Federal circuit court and is a standard virtually impossible to meet. The standard violates both the letter and the spirit of the Federal Employers' Liability Act and deprives worthy victims of negligence, such as Mr. Spence, their sole remedy for redress under law.

REASONS FOR ALLOWANCE OF THE WRIT

In requiring that a Plaintiff under the Federal Employers' Liability Act prove that his employer mentally injured him by unconscionable abuse, the Georgia Appellate Courts have required proof in support of a negligence claim brought under the FELA that is required of no other Federal Circuit Court of Appeals considering application of the FELA to suits brought for the negligent infliction of emotional distress.

In support of its holding, the Georgia Court of Appeals cited the case of Netto v. Amtrak, 863 F.2d 1210 (5th Cir. 1989). In Netto the railroad employee brought suit under the FELA for both the negligent and intentional infliction of emotional distress; however, he never advanced his negligence claim before either the district court or the circuit court of appeals and that claim was deemed abandoned by the Fifth Circuit. Netto, supra at 1214, fn. 4.

The Netto court did not address what elements must be present in the Fifth Circuit to make out a claim for the negligent infliction of emotional distress under the FELA, although it recognized the distinction between causes for intentional and negligent infliction of emotional distress at common law and cited Prosser and Keeton on Torts, pages 359-64 for a discussion as to that distinction. Netto stands only as authority for the principle that outrageous or unconscionable conduct must be shown to allow recovery for emotional distress arising out of intentional acts; it does not stand for the proposition that unconscionable or outrageous behavior must be shown to allow recovery for emotional distress arising out of negligent conduct as the Georgia Court of Appeals so asserted. The Georgia Court of Appeals also cited the Restatement (Second) of Torts, §46 as having been adopted by many jurisdictions and recognized as the general rule prevailing in the United States. However, §46 of the Restatement only deals with the intentional infliction of

emotional distress. The Restatement deals with the negligent infliction of emotional distress in §§312, 313, 436, and 436A.

After it was pointed out in Mr. Spence's motion for reconsideration to the Georgia Court of Appeals that it had cited no Federal case authority for its "Unconscionable Abuse Test", the Georgia Court of Appeals cited an opinion from a solitary Federal District Court in support of its holding: Visconti v. Consolidated Rail Corp., 801 F.Supp. 1200 (S.D.N.Y. 1992). The Visconti court stands alone in failing to treat differently a claim of negligent infliction of emotional distress from one alleging the intentional infliction of emotional distress. The Visconti court held that "unconscionable abuse" was a pre-requisite to "establish liability for purely emotional injury." Visconti at 1207 (emphasis supplied). Although it based its holding on this Court's decision in Atkinson, Topeka and Santa Fe Railway Co. v. Buell, 480 U.S. 557, 107 S.Ct. 1410, 94

L.Ed.2d 563 (1987), Visconti is the only court known to have decided that there is no distinction between an emotional injury caused intentionally or negligently. Apparently, it only need be determined that an injury is purely an emotional injury for the "unconscionable abuse test" to apply.

Mr. Spence submits that the Visconti court was wrong; unconscionable abuse need only be shown in order to support a claim for the intentional infliction of emotional distress, the prove of unconscionable abuse supporting an allegation of an intentional tort. Furthermore, even if unconscionable abuse must be shown for one suffering a purely mental injury, Mr. Spence did not suffer a purely mental injury, but suffered a panoply of physical symptoms as well such as insomnia, hair loss, and loss of appetite with an attendant rapid weight loss.

This Court, in the case of Atkinson, Topeka, and Santa Fe Railway Co. v. Buell, 480 U.S. 557, 107 S.Ct.

1410, 94 L.Ed.2d 563 (1987), recognized that the nationwide trend under common law was to recognize causes of action for wholly mental injuries and that such claims could be brought under the FELA. 107 S.Ct. 1417-1418. It was also noted that the majority of states allow a cause of action for the negligent infliction of emotional distress, abandoning the traditional arbitrary rule that a Plaintiff could not recover for his mental injuries unconnected with an actual or threatened impact. Buell at fn. 20. It was further noted that some courts require an objective showing of physical symptoms to recover for the negligent infliction of emotional distress, but not for the intentional infliction of emotional distress. Id. at fn. 21. Finally, where a claimant claimed to have suffered physical symptoms in addition to a severe psychological illness, it was recognized that the claim brought would not squarely present the question of a pure emotional injury at all. Id. at fn. 22.

Obviously this Court understands that time-

worn traditional bright-line rules limiting the recovery for mental injury are being properly rejected by a majority of jurisdictions. This Court did acknowledge that in the tort for the intentional infliction of mental distress, however, many jurisdictions together with the Restatement of Torts, §46(1) require an "intentional or reckless" standard of behavior on part of the defendant before recovery can be allowed and that intention can be "inferred from outrageousness of conduct". Id. at fn. 17. In short, the test for outrageousness or unconscionable behavior is a test applied only in cases where recovery is sought for the intentional infliction of emotional distress. The Georgia Appellate Courts have applied a test for recovery in suits brought for the intentional infliction of emotional distress to suits, such as Mr. Spence's, which seek recovery for the negligent infliction of emotional distress. This is wrong. It is unduly prohibitive to require such an obstacle to recovery in suits for the negligent infliction of emotional distress brought

under the FELA.

Courts, including this Court, have uniformly recognized that the history of the Federal Employers' Liability Act and its remedial purpose impel to the conclusion that it should be liberally construed as to the inclusion of its beneficiaries in order to effect its remedial purpose, notwithstanding the fact that it is in derogation of the common law and that standards of liability for negligence under the Act are significantly broader than in ordinary common-law negligence actions. See, Johnson v. Southern Pacific Co., 196 U.S. 1, 25 S.Ct. 158, 49 L.Ed. 363 (1904); Nivens v. St. Louis Southwestern Railway Co., 425 F.2d 114 (C.A.Tex. 1970), certiorari denied, 400 U.S. 879, 91 S.Ct. 121, 27 L.Ed.2d 116. As a liberally applied remedial statute for the protection of railroad employees, one ingredient in the application of the statute is that it should be applied in a uniform way as to method, type and quantum of proof required to qualify for relief. Neff v. Pa. Railroad

Co., 7 F.R.D. 532 (D.C. Pa. 1948). Unfortunately, the quantum of proof for railroad employees to recover for the negligent infliction of emotional distress is not being applied uniformly at present throughout the 50 states in actions brought under the Federal Employers' Liability Act. Georgia is the only state presently known to subscribe to the "Unconscionable Abuse Test" established by the Visconti district court to cases brought for the negligent infliction of emotional distress. The lack of a uniform rule or test as to when cases can be brought under the FELA for the negligent infliction of emotional distress is the very reason that this Court should grant the petition for writ of certiorari in this case and seize the opportunity to establish a uniform rule.

Railroads owe a duty to their employees to provide them with sufficient help in the performance of the work assigned to them. Yawn v. Southern Railway Co., 591 F.2d 312, 315 (5th Cir. 1979). The gist of Mr. Spence's complaint is that the Railroad required him to perform

multiple stressful jobs, ignored his complaints and those of his co-employees that the work demands were making them physically ill and endangering their health, violating Federal law in requiring hours to be worked over and above the maximum set by law, culminating in a disabling mental injury to Mr. Spence.

Mr. Spence's claim is very much like that brought by another railroad employee in the case of Carlisle v. Consolidated Rail Corp., 990 F.2d 90 (3rd Cir. 1993). In that case, as in Mr. Spence's, the railroad was sharply reducing its work force and requiring the plaintiff to work twin jobs, that of a supervisor and as a dispatcher, both jobs entailing responsibility for the safe movement of trains carrying passengers, freight, and hazardous materials. The plaintiff was required to work 12 to 15 hour shifts for 15 consecutive days [compare: Mr. Spence was required at one point to work for 70 consecutive days and to work 10 to 12 hours per day for more than 2 years with nearly no time off

and, while working, no break periods in which to take meals or attend to personal needs.]. The plaintiff in Carlisle was disabled from returning from his job as a train dispatcher and took new employment away from his railroad employment [compare: Mr. Spence is disabled from any kind of gainful employment.]. The Carlisle plaintiff, like Mr. Spence, experienced physical symptoms resulting from his mental distress, including insomnia, fatigue, headaches, depression, and weight-loss. Carlisle at 92. Prior to Carlisle, the Third Circuit had never upheld a claim for the negligent infliction of emotional distress under the FELA for injuries absent a physical impact, fright, or injury. Under the facts present before it in Carlisle, the Third Circuit upheld the denial of the defendant's motion for summary judgment and denied its motion for a new trial. The court declared that "it is becoming more and more apparent that emotional and physical injuries that are the foreseeable result of requiring workers to remain in unreasonably dangerous

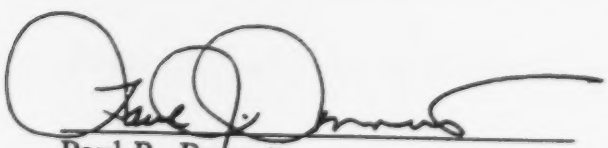
and stressful work conditions for significant periods of time can present a claim under the statute [FELA]." Id. at 96. If the Carlisle plaintiff was entitled to a trial and compensation of the facts present in that case, how much more deserving is Mr. Spence when the facts in his case are even more outrageous.

This Court in the case of Harris v. Forklift Systems, Inc., No. 92-1168 (Decided Nov. 9, 1993), rejected a "mathematically precise test" as to when a claimant under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §2000e et seq can recover against an employer for subjecting the claimant to a discriminatorily abusive work environment. Id. at 5. This Court should similarly reject the Georgia Court of Appeals' handling of Mr. Spence's claim here where the Georgia Court of Appeals applied an arbitrary, albeit terribly subjective, test to deny Mr. Spence his day in court. The Georgia State Appellate Courts should not be permitted to establish obstacles to FELA claimants

seeking compensation for mental injuries accompanied by physical symptomology where such barriers are not being erected by any Federal Circuit Courts of Appeal in like cases.

Presently pending before this Court is Consolidated Rail Corp. v. Gottshall and Consolidated Rail Corporation v. Carlisle, combined cases, Case No. 92-1956, argued before the United States Supreme Court in February. Should a decision be rendered in those combined cases which would dictate that lower state courts allow causes of action like that of Mr. Spence's to be brought under the FELA, it is respectfully submitted that this Court simply issue an Order requiring the Georgia Appellate Courts to conform to its decision in Gottshall and Carlisle, granting the petition in this case being thereby unnecessary.

Respectfully submitted:



Paul R. Bennett

APPENDIX

A-1 Opinion of the Georgia Court of Appeals (August 19, 1993)

A-8 Georgia Court of Appeals' Denial of Motion for Reconsideration (September 16, 1993)

A-10 Substituted Page Four of the Georgia Court of Appeals' original opinion (September 16, 1993)

A-12 Georgia Supreme Court's Denial of Petition for Writ of Certiorari (January 6, 1994)

A-14 Georgia Supreme Court's Denial of Motion for Reconsideration (February 3, 1994)

FIRST DIVISION

McMURRAY, P.J.

JOHNSON & BLACKBURN, JJ.

NOTICE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION to be deemed timely filed, (Court of Appeals Rules 4 and 48, March 1, 1985)

In the Court of Appeals of Georgia — August 19, 1993

A93A1715. NORFOLK SOUTHERN RAILWAY COMPANY et al. v. SPENCE.

McMURRAY, Presiding Judge.

Plaintiff Spence's amended complaint states claims under the Federal Employers' Liability Act, 45 USC §§ 51-60 ("FELA"), for negligent infliction of emotional distress and for intentional infliction of emotional distress,

and under the Hours of Service Act, 45 USCA § 61 et seq., for requiring plaintiff to work two jobs for periods of time in excess of the maximum hours permitted. Defendants Norfolk Southern Corporation, Norfolk Southern Railway Company and Central of Georgia Railway Company moved for summary judgment. A summary judgment was granted to defendant Central of Georgia Railway Company which had contended that plaintiff was not it's employee while the motion for summary judgment of the remaining two defendants was denied. This appeal from the denial of their motion for summary judgment by defendants Norfolk Southern Corporation and Norfolk Southern Railway follows the grant of their application for interlocutory appeal. Held:

We granted the application for interlocutory appeal in order to address contentions that the infliction of emotional distress claims are not viable FELA claims and that, if they are, plaintiff has failed to begin his action within

the statute of limitations. However, under guidance from our recent decision in Bowers v. Estep, 204 Ga. App. 615, 617 (2) (420 SE2d 336), we find that we need not reach these issues as this appeal may properly be decided upon the same basis as our earlier decision, that is, without deciding whether a plaintiff may assert a claim under FELA for negligent or intentional infliction of emotional distress, we hold that even if we allowed such a claim plaintiff Spence has failed to assert a claim that would entitle him to relief.

"Looking to common law developments for guidance, Urie v. Thompson, 337 U.S. 163, 174 (69 SC 1018, 93 LE 1282) (1949), we recognize that, as the Court noted in [Atchinson &c. R. Co. v. Buell, 480 U.S. 557, 568-569 (107 SC 1410, 94 LE2d 563)], most states recognize the tort of intentional infliction of emotional distress, but 'they vary in the degree of intent required to establish liability, and the level of physical manifestation of the

emotional injury required to support recovery. Moreover, some States consider the context and the relationship between the parties significant, placing special emphasis on the workplace.' (Footnotes omitted.) Id. The description of the tort given in the Restatement (Second) of Torts § 46 has been adopted by many jurisdictions and has been characterized as the general rule prevailing in the United States. Buell, supra at 568 n. 16. The Restatement, supra, provides that 'one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress,' id. at 71, and notes that 'the cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by

"malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' Id. at 72-73 (comment d). See [Netto v. Amtrak, 863 F2d 1210, 1214-1215]." Bowers v. Estep, 204 Ga. App. 615, 618 (2), supra.

The substance of plaintiff Spence's allegations complain of the amount of work he was required to perform. These allegations are supported by evidence as to both the number and stressful nature of the tasks he was assigned, and as to his work schedule which included lengthy periods with no days off and workdays of 12 hours or longer without adequate breaks for meals and other personal needs. However oppressive this regimen may have been to

plaintiff Spence, this was not that level of egregious or outrageous behavior which "justifiably results in that severe fright, humiliation, embarrassment, or outrage which no reasonable person is expected to endure. [Cites.]" Kornegay v. Mundy, 190 Ga. App. 433, 434 (379 SE2d 14). As a matter of law, the conduct at issue in the case sub judice does not support liability for negligent or intentional infliction of emotional distress. Bowers v. Estep, 204 Ga. App. 615, 617 (2), 618, supra.

Furthermore, insofar as plaintiff's claim is predicated on 45 USCA § 61 et seq., it is not well founded. No private cause of action arises from violation of these statutory provisions. 45 USCA 61 et seq.; United Transportation Union v. Lewis, 699 F2d 1109, 1113 (II). The state court erred in denying the motion for summary judgment submitted by defendants Norfolk Southern Corporation and Norfolk Southern Railway Company.

Judgement reversed. Johnson and Blackburn, JJ., concur.

COURT OF APPEALS

OF THE STATE OF GEORGIA

Atlanta, September, 16, 1993

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A93A1715. NORFOLK SOUTHERN RAILWAY COMPANY ET AL. V. SPENCE

UPON CONSIDERATION OF THE MOTION FOR RECONSIDERATION FILED ON BEHALF OF THE APPELLEE IN THE ABOVE STYLED CASE, IT IS HEREBY ORDERED THAT SAID MOTION IS HEREBY DENIED. IT IS FURTHER ORDERED THAT PAGE 4 OF THE ORIGINAL OPINION IN THIS CASE ATTACHED HERETO BE

SUBSTITUTED FOR PAGE 4 OF THE ORIGINAL OPINION DATED AUGUST 19, 1993.

Court of Appeals of the State of Georgia Clerk's Office, Atlanta September 16, 1993

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Victoria McLaughlin, CLERK.

and workdays of 12 hours or longer without adequate breaks for meals and other personal needs. However oppressive this regimen may have been to plaintiff Spence, this was not that level of egregious or outrageous behavior which "justifiably results in that severe fright, humiliation, embarrassment, or outrage which no reasonable person is expected to endure. [Cits.]" Kornegay v. Mundy, 190 Ga. App. 433, 434 (379 SE2d 14). As a matter of law, the conduct at issue in the case sub judice does not support liability for negligent or intentional infliction of emotional distress. Bowers v. Estep, 204 Ga. App. 615, 617 (2), 618, supra. See also Visconti v. Consolidated Rail Corporation, 801 F.Supp. 1200, 1207 (2).

Futhermore, insofar as plaintiff's claim is predicated on 45 USCA § 61 et seq., it is not well founded. No private cause of action arises from violation of these statutory provisions. 45 USCA § 61 et seq.; United Trans-

portation Union v. Lewis, 699 F2d 1109, 1113 (II). The state court erred in denying the motion for summary judgment submitted by defendants Norfolk Southern Corporation and Norfolk Southern Railway Company.

Judgment reversed, Johnson and Blackburn, JJ., concur.

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

DATE: JANUARY 06, 1994

Paul R. Bennett
AGNEW, SCHLAM & BENNETT, P.C.
812 Broadway
P.O. Box 11
Columbus GA 30902

Case No. S94C0048

MICHAEL SPENCE V. NORFOLK SOUTHERN

RAILWAY COMPANY ET AL.

COURT OF APPEALS CASE NO. A93A1715

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sincerely,

Sherie M. Welch, Clerk

SUPREME COURT OF GEORGIA

ATLANTA FEBRUARY 03, 1994

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S94C0048

MICHAEL SPENCE V. NORFOLK SOUTHERN RAILWAY COMPANY ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Sherie M. Welch, Clerk.

CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of this petition to counsel of record for Defendants-Respondents, Norfolk Southern Railway Company and Norfolk Southern Corporation:

Edgar A. Neely, Jr.,
William C. Thompson and
Laura A. Shaw
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By depositing a copy of this petition in a United States post office or mail box, with first-class postage pre-paid, addressed to the counsel listed above.

AGNEW, SCHLAM & BENNETT, P.C.

By: _____
Paul R. Bennett
Attorney for Plaintiff-Petitioner

Supreme Court, U.S.
FILED
JUN 6 1994
OFFICE OF THE CLERK

NO. 93-1781

IN THE
United States Supreme Court
OCTOBER TERM, 1993

MICHAEL SPENCE,

Plaintiff-Petitioner,

vs.

NORFOLK SOUTHERN RAILWAY COMPANY AND NORFOLK SOUTHERN CORPORATION,

Defendants-Respondents.

APPEAL FROM THE GEORGIA SUPREME COURT

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORAI

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QUESTIONS PRESENTED

1. Whether a management-level employee of a railroad, who has not suffered a physical work-related injury, may pursue a claim under the Federal Employers' Liability Act for what he contends is a nervous breakdown allegedly caused by the stressful nature of his job?

2. Whether a claim for a mental injury may be prosecuted under the Federal Employers' Liability Act when its symptoms and job-related cause were known to the Petitioner more than three years prior to the filing of his FELA lawsuit? I.e., is Petitioner's claim barred by the FELA limitations statute?

LIST OF AFFILIATED CORPORATIONS

Norfolk Southern Corporation

Norfolk Southern Railway Company

Norfolk & Western Railway Company

Alabama Great Southern Railroad Company, The

Atlanta and East Carolina Railway Company

Camp Lejeune Railroad Company

Central of Georgia Railroad Company

Chesapeake Western Railway

Cincinnati, New Orleans and Texas Pacific Railway Company

Georgia Northern Railway Company, The

Georgia Southern and Florida Railway Company

Live Oak, Perry and South Georgia Railway Company

New Orleans Terminal Company

State University Railroad Company

Tennessee, Alabama and Georgia Railway Company

Tennessee Railway Company

North American Van Lines

Triple Crown Services, Inc.

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STATUTES INVOLVED

The only statute involved in this case is the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.*

STATEMENT OF THE CASE

Respondents do not agree with nor accept the recitation of facts contained in the petition for certiorari. The depositions, interrogatory answers and affidavits filed below will speak for themselves should the Court grant this petition. In so doing, the record will reflect that Petitioner's job was no different from, nor more stressful than, those of other employees within the railroad.

Among other things, it is inaccurate for Petitioner to contend that the number of communications coordinators was halved. While two individuals did accept early retirement in September 1987, they were replaced by others within a few weeks. Petitioner also implies in his brief that he regularly worked seventy day periods without time off. The record reveals that if such a period of work transpired, it did so only on one occasion.

Respondents dispute that analyst jobs were eliminated "long before" computers were in place. Petitioner's Brief, p. 4. It also is inaccurate and misleading to characterize an analyst's job as similar to that of an air traffic controller. *Id.* The positions are not comparable at all.

For purposes of evaluating the present petition, Respondents show that the following narrative reflects the evidence in the record of this case. The Petitioner was employed by the Norfolk Southern Railway Company (f/k/a/ Southern Railway Company) from the mid-1970s until January 1989. At all times relevant to this litigation, he was employed by the railroad as a communications coordinator. In that position, Petitioner's job was to receive telephone calls relative to any problems with the commu-

nication network of the Norfolk Southern Railway Company. He would then take steps to ensure that such problems were corrected. Within Norfolk Southern Railway Company, a communications coordinator is a management-level position.

According to the Petitioner's allegations, the railroad began reducing its work force in September 1987. This reduction reportedly increased the amount of work he was required to perform. Petitioner also argues that in addition to his normal responsibilities, he was required to perform the duties of a detector analyst on numerous occasions.

Prior to September 1987, Petitioner reportedly suffered no stress-related problems; however, beginning in late 1987 and continuing through 1988, the Petitioner claims to have experienced difficulty sleeping and a loss of weight. He blames these developments upon the increase in his work load. Mr. Spence testified that beginning in 1987 he complained regularly to his superiors about his heavy work load and the adverse effect it was having upon his life and health.

The Petitioner claims that his problems became particularly severe during the last month or so of 1988, and, as a result of his work, he experienced crying attacks on the job during the first week of January 1989. Petitioner never suffered a physical injury while an employee of the railroad, but he does allege that he developed physical problems as a result of his stress-related condition. The physical injuries identified are excessive hair loss, psoriasis, stomach tightening and loss of weight. Petitioner alleges that on January 19, 1989, he could no longer function because of what he characterizes as a "total breakdown". That "breakdown" forms the basis for the

underlying litigation. Mr. Spence was the only coordinator to suffer a claimed nervous breakdown or to suggest that the job was beyond his emotional capacity.

REASONS WHY THE WRIT SHOULD BE DENIED

I. PLAINTIFF HAS FAILED TO PRESENT A CLAIM FOR EITHER NEGLIGENT OR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

The Georgia Court of Appeals ruled correctly when it rejected Petitioner's claim in *Norfolk Southern Railway Company v. Spence*, 210 Ga. App. 284, 435 S.E.2d 680 (1993), by applying the same reasoning articulated by this Court in *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 566 n. 13, 107 S.Ct. 1410, 1416 n. 13, 94 L.Ed 2d 563 (1987). *Buell* determined that in order to present a claim for emotional injuries under the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.*, a plaintiff must establish that he suffered a severe emotional injury as a result of "unconscionable abuse" on the part of his employer.

The *Buell* decision recognized that if an employee were not required to demonstrate unreasonable conduct on the part of his employer, virtually every intra-office dispute and personnel matter could be transformed into FELA litigation. *Id.* It is a reality of our times that we live in a society full of daily stresses at home and in the workplace. If job stress, without more, can support FELA litigation, the courts will be swamped, and it will be increasingly difficult, if not impossible, to manage a railroad on a day-to-day basis.

The Georgia Court of Appeals resolved Petitioner's claim against him even though it assumed that Mr. Spence had actually stated a claim under the FELA; however, relief such as he seeks simply is unavailable under the FELA. Petitioner did not suffer any on-the-job injury connected with an identifiable or traumatic incident. Instead, Petitioner claims only that because his job was stressful, he developed emotional problems and is thereby entitled to relief under the FELA. The FELA was not created to provide judicial relief for such stress claims, as the majority of courts have already found.

The Fifth and Seventh Circuit Courts of Appeal have squarely held that the FELA does not create a cause of action for tortious harms caused by acts which lack any physical contact or threat of physical contact with the victim. *See Gough v. Natural Gas Pipeline Company of America*, 996 F.2d 763, 765 (5th Cir. 1993)[1]; *Ray v. Consolidated Rail Corp.*, 938 F.2d 704, 705 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 914 (1992). As explained by the Fifth Circuit, the injury rule has two important functions for courts evaluating mental injuries:

> One purpose is to 'provide courts with an objective means of ensuring that the alleged mental injury is not feigned.' (cit. omitted). A more important purpose of the rule is to provide a principled basis for limiting liability. Traumatic events may cause foreseeable emotional distress through a broad range of time and space. Jurisdictions that apply expansive recovery rules such as the

[1] *Gough* is a Jones Act case, *see* 46 U.S.C. §688. Rules that govern liability under the Jones Act are the same as those which apply under the FELA. *See Yehia v. Rouge Steel Corp.*, 898 F.2d 1178, 1184 (6th Cir. 1990).

> bystander theory must depend upon proximate cause to define the boundary of liability. We are wary of such ad hoc adjudications and prefer predictable rules for the determination of liability.... The bright line impact or injury rule performs a similar function.

Gough, at p. 765-66. In the instant case, Petitioner's claim plainly fails under the injury rule; thus, no reason exists for this Court's further review of his case.[2]

Petitioner argues that his case merits review because of a combined case presently pending before the Court, *Consolidated Rail Corp. v. Gottshall* and *Consolidated Rail Corp. v. Carlisle*, Supreme Court Case No. 92-1956. Respondents submit otherwise. Should a decision in favor of the Consolidated Rail Corporation be issued, there clearly would be no reason to prolong further this litigation. Even if that case is resolved against Conrail, however, such a disposition will not suggest that additional review of this case is warranted.

The case at bar presents fundamentally different facts from those in *Gottshall v. Consolidated Rail Corp.*, 988 F.2d 355 (3d Cir. 1993). In *Gottshall*, the plaintiff and his best friend were performing rigorous physical work in the broiling sun for long hours. As a direct result of the harsh working conditions, plaintiff's best friend suffered

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[2] The injury rule is the test pursuant to which Petitioner's claim would be evaluated were the Court to examine Georgia law (as per *Buell* at 480 U.S. 568-70) for assistance in analyzing this case. *See OB-GYN Assoc. of Albany v. Littleton*, 259 Ga. 663, 665, 386 S.E.2d 146 (1989).

a heart attack which ultimately proved fatal. The friend lingered as the plaintiff attempted to revive him while their supervisor acted inappropriately and in a manner which the appellate panel clearly disapproved. Whether this Court determines that the plaintiff in *Gottshall* has stated a claim under the FELA has no bearing upon whether the Petitioner in this case is entitled to proceed. Mr. Gottshall directly participated in a traumatic event involving the death of a close personal friend. His case bears no resemblance to that of the Petitioner here.

Carlisle v. Consolidated Rail Corp., 990 F.2d 90 (3d Cir. 1993), is factually distinct as well. The plaintiff there established that co-workers in similar positions had suffered cardiac arrests, nervous breakdowns and clinical depression. The Federal Railway Administration had issued a report criticizing the defendant for its "hazardous working conditions". More importantly, the plaintiff was abused by an alcoholic supervisor. *Id.*, pp. 92-93. Petitioner Spence was not subjected to abusive behavior, he alone among his peers developed emotional problems, and his job is not at all comparable to that of a train dispatcher in the northeast corridor. Therefore, additional consideration of this case is unwarranted regardless of the resolution in *Carlisle*.

Every job is stressful to some degree. Allowance of FELA claims for psychological problems which are unconnected to a physical injury or unconscionable conduct by the employer is beyond the FELA's scope, exceeds the intent of Congress, and will result in a multitude of cases being filed by disgruntled employees. The issue of stress-related FELA claims was correctly resolved by the district court in *Kraus v. Consolidated Rail Corp.*, 723 F.Supp. 1073, 1090 (E.D.Pa. 1989), *appeal dis-*

missed 899 F.2d 1360 (3d Cir. 1990), which dismissed them and found that,

> ...[P]laintiffs, who allegedly suffer from stress-related physical or purely emotional injuries or illnesses caused by their general working conditions, fail to state a claim under the FELA. Lawyers, doctors, bus drivers, police officers, laborers, and, yes, even judges, face stressful conditions everyday. To suggest that Congress intended to single out railroad workers... as worthy of special protection from such stress would be pure folly. Job-related stress is simply not the type of problem intended to be dealt with by the FELA.

Accord Moody v. Boston & Marine Corp., 921 F.2d 1, 5 (1st Cir. 1990); *Holliday v. Consolidated Rail Corp.*, 914 F.2d 421, 423-24 (3d Cir. 1990), *cert. denied* 498 U.S. 1090 (1991). *See also Lewis v. Union Pacific R. Co.*, 497 N.W.2d 33 (Neb. 1993); *Handy v. Union Pacific R. Co.*, 841 P.2d 1210 (Utah Appeals 1992).

The Georgia Court of Appeals assumed *arguendo* that Petitioner could in theory state a claim for relief under the FELA. Having examined the substantive evidence supporting Petitioner's allegations, however, the state court properly found that Petitioner's case lacked substantive merit. Consequently, summary judgment in the railroad's favor was granted. There is no reason for this Court to review further the allegations advanced by the Petitioner in this litigation. Whatever the result in the FELA litigation presently before the Court, its adjudication will not materially alter the result in this case. For that reason, this petition should be denied.

II. PETITIONER'S CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS.

Petitioner's claim is barred by 45 U.S.C. §56, which requires that all FELA lawsuits must be filed within three years of the time when an injury occurs. A plaintiff bears the burden of establishing that he has filed an action under the FELA in a timely manner. *Crisman v. Odeco, Inc.*, 932 F.2d 413, 416 (5th Cir.), *cert. denied*, 112 S.Ct. 337 (1991). As Mr. Spence's claim was not filed in a timely manner, it should be dismissed for that reason.[3]

Under *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949), and *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed. 2d 259 (1979), the discovery rule applies in FELA cases. *Dubose v. Kansas City Southern Ry. Co.*, 729 F.2d 1026, 1029-30 (5th Cir.), *cert. denied*, 469 U.S. 854 (1984). Under that rule, "...[A] claim accrues under FELA when the plaintiff possess sufficient critical facts from which the injury and its cause, including its work-relatedness, should be plainly know." *Robb v. CSX Transp., Inc.*, 204 Ga. App. 690, 693, 420 S.E. 2d 370 (1992). The evidence of record in this case is replete with testimony which demonstrates that Petitioner was aware of the problems he claims to have suffered and their alleged work-related causation well over three years before this lawsuit was filed on January 17, 1992.

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[3] Respondents raised this issue below; however, the Georgia Court of Appeals did not address it since it ruled against Petitioner on other grounds.

According to Mr. Spence's interrogatory answers, he began to experience problems with his health stemming from his job as early as September 1987, and he claims to have complained continuously about that fact to his supervisors. His answer to interrogatory 6 of the railroad's first interrogatories states that Petitioner went to his supervisor's office "a number of times" in 1987 to discuss his work, the stress he was under and the *"severe impact this working condition was having on [his] health..."*. (Emphasis supplied). In the affidavit which Petitioner filed in opposition to the railroad's motion for summary judgment, he testified as follows:

> The stress from my work took an ever increasing toll upon me in late 1988 and early 1989. My insomnia became progressively worse, my weight loss increased dramatically [beginning in December 1988], my attentiveness to tasks grew extremely diminished and I began to suffer from episodes of acute sobbing.

Petitioner's deposition makes clear that the "episodes of acute sobbing", which he connected to the stress of his job, occurred during the first week of January 1989.

Petitioner did not file his lawsuit in this case until January 17, 1992. As shown above, Petitioner possessed "sufficient critical facts from which [his] injury and its cause, including its work-relatedness, [could have been] plainly known" well before January 16, 1989 (the statutory limit). *See Robb v. CSX Transp., Inc., supra* at 693. *See also Jones v. Maine Cent. R. Co.*, 690 F.Supp. 73 (D. Me.1988); *McCoy v. Union Pacific R. Co.*, 796 P.2d 646 (Or. App. 1990).

Petitioner argued below that because in his opinion he had not experienced a complete breakdown until January 19, 1989, the statutory bar did not apply; however, "that [petitioner's"] injury had not reached its maximum severity [in 1988 and early 1989] but continued to progress does not affect [the fact that 45 U.S.C. §56 bars the lawsuit]." *See Fries v. Chicago & Co. Transp. Co.*, 909 F.2d 1092, 1096 (7th Cir. 1990).[4]

Because Petitioner did not file his lawsuit within the time allowed by 45 U.S.C. §56, this case should be dismissed for reasons independent of those provided by the Georgia Court of Appeals below. Accordingly, nothing will be gained by further review of this litigation by this Court.

III. CONCLUSION.

Petitioner's case has been adequately considered by the courts below. The circumstances of his case do not lend themselves to relief under the Federal Employers' Liability Act. Equally important, he has failed to comply with the limitations requirement of 45 U.S.C. §56. Nothing further is to be gained from prolonging this litigation.

A number of conditions in life combine to create stress, both at home and on the job. If every instance of work-related stress may give rise to litigation under the FELA, an intolerable situation will be created. The time

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[4] The fact that Petitioner's claimed injury is mental in nature does not change this result. The same rules of limitation apply to such injuries. *See Armstrong v. Trico Marine, Inc.*, 923 F.2d 55, 58-59 (5th cir. 1991); *Puthe v. Exxon Shipping Co.*, 802 F.Supp. 819, 829-30 (E.D.N.Y. 1992), *aff'd. other grounds* 2 F.3d 480 (2d Cir. 1993).

and expense of defending these cases will unduly burden both employers and the courts. The FELA was never intended to provide relief of this nature.

WHEREFORE, Respondents pray that the petition be dismissed.

Respectfully submitted,
NEELY & PLAYER

By:
Edgar A. Neely, Jr.

By:
William C. Thompson

CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI upon counsel of record for Plaintiff-Petitioner, Michael Spence:

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By depositing a copy of this response in a United States post office or mail box, with first-class postage pre-paid, addressed to the counsel listed above.

William C. Thompson